No. 91-1862

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1991

DAVID GANTT, *et al.*,
Appellants,

vs.

DEAN SKELOS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO APPELLEES' MOTIONS TO DISMISS AND AFFIRM AND SUGGESTION OF MOOTNESS

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LIST OF PARTIES

Appellants

DAVID GANTT, individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; SAUL WEPRIN, Speaker of the Assembly of the State of New York; and THE ASSEMBLY OF THE STATE OF NEW YORK, ASQUITH REID, MORTON M. AVIGDOR, VIVIAN BRIGHT, BERNARD FREILICH, CORINNA GRANT, LARAINE A. GRANDE, LORRELLE HENRY, and LUIS OSORIO, each a voter in the State of New York; and GARY L. ACKERMAN, FLOYD H. FLAKE, THOMAS J. MANTON, MAJOR R. OWENS, CHARLES B. RANGEL, CHARLES E. SCHUMER, and STEPHEN J. SOLARZ, each individually as a voter in the State of New York and as a Member of the U.S. House of Representatives.

Appellees

DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.; EVELYN CORCHARDO and MICHAEL T. WARING.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY TO APPELLEES' MOTIONS TO DISMISS AND AFFIRM AND SUGGESTION OF MOOTNESS

This is an appeal from an order of a three-judge court enjoining a parallel apportionment case pending in New York State Supreme Court. By order dated May 13, 1992, this Court stayed the injunction below during this appeal.

Appellees have responded to our appeal with (1) a motion to dismiss the appeal for want of a substantial federal question, (2) a motion to affirm the order below, and (3) a suggestion of mootness. For reasons other than those appellees advance, and based on events that have occurred since appellees filed their response, we agree that

the action below is now moot. Accordingly, we join in the suggestion of certain appellees that this Court vacate the order below and remand the action to the three-judge court with instructions to dismiss the action as moot.

REPLY STATEMENT OF THE CASE

The facts leading to this Court's May 13, 1992 order staying the injunction below are set forth in our Jurisdictional Statement (see "J.S." at 5-11). In brief, on March 26, 1992, certain voters commenced an action entitled *Reid, et al.* v. *Marino, et al.*, No. 9567/92, in the Supreme Court of the State of New York seeking an order directing New York State to enact a plan of apportionment for the State's 31 congressional districts and, if the State failed to act, providing for a court-devised apportionment plan. Five days later, another group of voters commenced the action below seeking essentially the same relief.

On May 5, 1992, the State having failed to enact apportionment legislation, the State Supreme Court appointed a panel of three referees to devise a congressional apportionment plan. (J.S., App. at 10a.) Later that same day, the federal court below also issued an order providing for the appointment of a special master to devise a congressional apportionment plan. In addition, denying a motion to abstain in favor of the State Supreme Court action, the lower court enjoined the parties and counsel in the State Supreme Court action from proceeding any further in that action. (J.S., App. at 8a.)

On May 13, 1992, on a reference from Justice Thomas of appellants' motion for a stay of this injunction pending appeal, this Court stayed the portion of the lower court's order enjoining the parties and counsel from proceeding in State Court, *David Gantt, etc., et al.* v. *Dean Skelos, etc., et al.*, __ U.S. __, No. 91-1862, A-829 (May 13, 1992). Thereafter, the federal court's special master and the State Court's panel of referees separately proceeded to devise congressional apportionment plans for submission to their respective courts. By June 1, 1992, the special master and the panel of referees had each prepared a report providing for a plan of

congressional apportionment. The plans differed in significant respects.

On June 8, 1992, the State Supreme Court entered a judgment adopting the report of its referees, finding the referees' plan to be in compliance with all applicable constitutional and statutory requirements, and directing the State election officials to implement the plan forthwith.[1/]

Within three days, by June 11, 1992, the State legislature passed and the Governor signed into law a congressional apportionment plan identical to the plan embodied in the State Supreme Court's judgment. Because three counties or "boroughs" within New York City are covered jurisdictions under section 4(b) of the Voting Rights Act, 42 U.S.C. §1973b, the State promptly submitted this apportionment legislation to the U.S. Department of Justice for preclearance review, under section 5 of the Voting Rights Act. 42 U.S.C. §1973c.

Also on June 11, 1992, the three-judge court below issued an order approving and adopting the report of its special master and finding the special master's plan to comply with all applicable constitutional and statutory requirements. The court directed that, if the Justice Department failed to preclear the State's apportionment legislation by July 8, 1992, then the State was to implement its special master's plan. (Sugg., App. at A13-17.)

On June 19, 1992, certain appellees—the parties defendant who had originally sought the injunction against the State Supreme Court action—moved to "withdraw" their motion for that injunction. (Sugg., App. at A18-27.)

[1/] The State Supreme Court's order and judgment appears beginning on page A1 of the appendices to the Suggestion of Mootness filed here by appellees Skelos, Marino, and the State Senate of the State of New York, which we hereafter cite as "Sugg., App."

On July 2, 1992, the U.S. Department of Justice advised the State of its decision to preclear the State's congressional apportionment legislation without objection.

On July 6, 1992, certain appellees—plaintiffs below—moved before the three-judge court for a preliminary injunction restraining the State from implementing the precleared apportionment legislation and imposing instead the plan proposed by the federal court's special master. These appellees argued that the State legislation violated section 2 of the Voting Rights Act. 42 U.S.C. §1973. On July 10, 1992, the three-judge court denied the motion without prejudice to plaintiff-appellees' right to challenge the State legislation in a new and separate proceeding. The court then dismissed the action below as moot. The court made no ruling on the pending application to "withdraw" the motion to enjoin the proceeding in State Supreme Court. (Reply App. at A1.)[2/]

The process for qualifying to appear on the ballot in the primary election for party nominations for Congress is now underway in accord with the State's legislation.

REPLY ARGUMENT

This action is now moot. The complaint below sought a determination that New York's existing congressional district lines were unconstitutional and violated the Voting Rights Act. Events occurring since the complaint was filed—specifically the State Supreme Court's judgment adopting a new congressional apportionment plan and, subsequently, the State's enactment of that plan in legislation duly precleared by the U.S. Justice Department—eliminated the basis for the complaint.

These events also render academic the questions presented on this appeal. Those questions are: (1) whether under the Anti-Injunction Act, 28 U.S.C. § 2283, the court below erred in enjoining the State Supreme Court from adjudicating a congressional

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[2/] The citation is to the appendix to this Reply.

apportionment action, and (2) whether under *Scott* v. *Germano*, 381 U.S. 407 (1965), the court below erred in failing to abstain from exercising jurisdiction over a congressional apportionment case when the State Supreme Court was ready, willing, and able to adjudicate the same dispute.

No ongoing dispute remains for the resolution of these questions. This Court's stay of the injunction below enabled the State Supreme Court to adjudicate the congressional apportionment case pending before it. The State Supreme Court's judgment produced a plan that the State legislature and Governor enacted into law and that the U.S. Justice Department precleared. The court below has accepted this precleared legislation as dispositive of the issues presented to it. Consequently, no actual case or controversy exists on whether the lower court's injunction against the State Supreme Court action was error, or on whether the three-judge court should have abstained from exercising jurisdiction.

For this reason, we join in the suggestion of appellees Dean Skelos, Ralph J. Marino, and Senate of the State of New York that this action is now moot and that, consistent with *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979), and *United States* v. *Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950), this Court should vacate the order below enjoining the parties and counsel from proceeding in State Supreme Court, and then remand this action to the three-judge court with instructions to dismiss the action as moot. (See Sugg. at 4.)

CONCLUSION

For the foregoing reasons, the order appealed from should be vacated and the action remanded with instructions to dismiss the action as moot.

Dated: New York, New York
July 23, 1992

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and EVELYN CORCHARDO,

Plaintiffs,

- against - CV-92-1521(SJ)

DAVID GANTT, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Co-Chairman of the New York State Legislative Task Force on Demographic Research and Reapportionment; NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; SAUL WEPRIN, Speaker of the Assembly of the State of New York; RALPH MARINO, Majority Leader of the New York State Senate; MARIO CUOMO, Governor of the State of New York; STANLEY LUNDINE, Lieutenant Governor of the State of New York; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK,

Defendants.

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MICHAEL T. WARING,

Plaintiff,

- against -

DAVID GANTT, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; DEAN SKELOS, Individually and as Co-Chairman of the Legislative Task Force on Demographic Research and Reapportionment; THE NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT; THE SENATE OF THE STATE OF NEW YORK; THE ASSEMBLY OF THE STATE OF NEW YORK; THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, RONALD STARKWEATHER, Individually and as Commissioner of the Board of Elections of the County of Monroe; M. BETSY RELIN, Individually and as Commissioner of the Board of Elections of the County of Monroe,

Defendants.

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MEMORANDUM OF DECISION

CV-92-1776(SJ)

BEFORE: PRATT, *Circuit Judge*, and MARTIN, Jr. and JOHNSON, Jr., *District Judges*.

In the last decision of this three-judge court, we approved the reapportionment plan recommended by the Special Master and provided that it would take effect on July 8, 1992, unless the state legislature's plan should become operative through preclearance by the Justice Department. Since that time, the Justice Department, by letter dated July 2, 1992, has granted preclearance by notifying the legislature's representatives that the Attorney General does not interpose any objection to the state's congressional redistricting plan and that it is satisfied that "this redistricting legislation was neither designed to discriminate against minority voters nor does it have a retrogressive affect on their voting rights."

By order to show cause dated July 6, 1992, plaintiffs have moved for a preliminary injunction designed to prevent implementation of the state's redistricting plan and seeking instead to implement the redistricting plan recommended by the Special Master and conditionally approved by this three-judge court. Memoranda in opposition to the motion were filed by the Senate Republicans and the Assembly Democrats. Upon the return of the motion before the three-judge panel on Thursday, July 9, 1992, all interested parties were given an opportunity to be heard.

Plaintiffs and others who represented members and groups of the New York City Latino community argued in favor of the Special Master's plan, contending that the state's plan did not sufficiently remedy prior dilution of the voting rights of Latinos, and therefore violated § 2 of the Voting Rights Act. Plaintiffs argued that their § 2 claim was asserted in the original complaint and continued to be viable under the existing complaint. In the event that the court should view the existing complaint as inadequate to support their present claim, plaintiffs moved orally to amend the complaint. Plaintiffs conceded that their § 2 claim was appropriate for a single district judge, but contended that it could also be entertained by this three-judge court. With respect to the motion for a preliminary injunction, plaintiffs argued that the dilution of their

voting rights constituted irreparable harm and that the past history of discrimination against the New York City Latino voting community presented a sufficient showing of likelihood of success on the merits.

Defendants and others opposing the motion contended that plaintiffs were too late in seeking to enjoin implementation of the state's congressional redistricting plan when the political processes for designating candidates to the 31 districts around the state had already begun; that the public interest required that the November 1992 congressional elections go ahead on the plan that the state legislature had developed; that the present action, having been originally brought as a challenge to the 34-district congressional plan that applied during the past decade, was now moot because that plan was replaced by the 31-district state plan adopted by the legislature and approved by the governor, and that any challenge to the new state redistricting plan under § 2 of the Voting Rights Act should be brought before a single district judge in a new action that could be subjected to the normal litigation procedures of pretrial motions, discovery, and direct and cross-examination of witnesses, all unhampered by the severe time constraints imposed by the November 19, 1992 election date.

After consideration of the prior proceedings in this action, of all the papers submitted on this motion, and of the oral arguments, and after due deliberation, IT IS ORDERED THAT:

1. Plaintiffs' motion, brought on by order to show cause dated July 6, 1992, seeking a preliminary injunction to implement the Special Master's congressional redistricting plan, is denied.

2. Plaintiff's oral motion to amend the complain is denied.

3. This action is dismissed as moot.

4. In denying the motions and dismissing the action, the court does not express or imply any opinion as to the merits of plaintiff's claim that the state redistricting plan dilutes violated § 2

of the Voting Rights Act by diluting the voting power of the New York City Latino community.

5. The clerk shall enter an appropriate judgment dismissing this action as moot.

SO ORDERED.

/s/ George Pratt (sj)
George C. Pratt
U.S. Circuit Judge

/s/ John Martin (sj)
John S. Martin, Jr.
U.S. District Judge

/s/ Sterling Johnson
Sterling Johnson, Jr.
U.S. District Judge

Dated: Brooklyn, New York
July 10, 1992.